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IN THE

Supreme Court of the United States

December Term, 1971

No. 71-750

NATHAN T. WOLKOMIR, as President of THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES ET AL.,

Petitioners,

v.

FEDERAL LABOR RELATIONS COUNCIL by Robert E. Hampton, Chairman, et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No. .....

NATHAN T. WOLKOMIR, as President of the National Federation of Federal Employees, Harrison Gilmer, as President of Local 2, National Federation of Federal Employees, Martha Ginsburgh, Willie McCurdy, Roy Glammeyer, Dina Maltagliati, on behalf of themselves and all other employees of Local 2, similarly situated, who have executed authorizations for payroll deductions in favor of Local 2

Petitioners

against

FEDERAL LABOR RELATIONS COUNCIL by Robert E. Hampton, Chairman, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan T. Wolkomir, as President of the National Federation of Federal Employees, Harrison Gilmer, as President of Local 2, National Federation of Federal Employees, Martha Ginsburgh, Willie McCurdy, Roy Glammeyer, Dina Maltagliati, on behalf of themselves and all other employees of Local 2 similarly situated, who have executed authorizations for payroll deductions in favor of Local 2, respectfully petition for a writ of certiorari to review the order of the Court of Appeals of the United States Court of Appeals for the District of Columbia in this case.

Opinions Below

The order of the Court of Appeals, (App. A, *infra*), is not yet reported. The oral opinion of the District Court (App. B, *infra*), is not officially reported. It is set forth in full at 77 LRRM, pp. 2977-2979. The judgment of the District Court, (App. C, *infra*), is not reported. The order of the Court of Appeals, (App. D, *infra*), in the case of *American Federation of Government Employees* against *Robert E. Hampton*, Chairman, Federal Labor Relations Council, et al., No. 71-1581, is not reported.

Jurisdiction

The order of the Court of Appeals was filed by the Clerk of that court on August 10, 1971.* It denied appellants' motion for temporary restraining order and for preliminary injunction, and further ordered that respondents' oral motion for summary affirmance of the district court decision be granted. The District Court judgment, dated July 23, 1971 and filed by the Clerk of that Court on the same day, dismissed plaintiffs' petition (1) on the ground that the Court lacked subject matter jurisdiction, and (2) denied plaintiffs' motion for preliminary injunction on the ground that it was "moot", (App. C. *infra*).[1] The oral opinion of the District Court was rendered immediately following argument before that Court, (App. B, *infra*). Jurisdiction of that Court was invoked under the First Amendment to the Constitution of the United States and by virtue of 42 USCA, Section 1981, Rule 23 of Federal Rules of Civil Procedure and pursuant to 5 USCA, Section 702.

The jurisdiction of this Court is invoked under 28 United States Code 1254 (1).

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* Mr. Chief Justice Burger extended the time for filing a petition for a Writ of Certiorari to December 8, 1971.

[1] The Court likewise dismissed the petition in the case mentioned in the last sentence of the preceding paragraph, on the same grounds.

Questions Presented

1. Where an Act of Congress, U.S.C. 5525, provides that the head of each agency may "establish procedures" under which "each employee of the agency" is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate, and such Act was implemented by an Executive Order, and by Civil Service Commission regulations which for many years permitted wage deductions from employees' salaries for payment of union dues, may the Federal Labor Relations Council allow the statutory benefits to members of majority unions only, while denying such benefits to members of minority unions?

2. Does the foregoing agency restriction upon the benefits granted "each employee" by the statute contravene the intention of Congress, which has provided only that the agency head (and the President) "may establish procedures" for the making of allotments by Federal employees for an "appropriate" purpose?

3. Does Executive Order 11491, as implemented by the regulations of the Federal Labor Relations Council and the Civil Service Commission, impermissibly trespass upon the fundamental rights of petitioners to organize collectively and select the union of their choice, and freely to choose those who shall represent them in employment matters, in violation of appellants' rights under the First, Fifth, and Fourteenth Amendments?

Constitutional and Statutory Provisions and Regulations Involved

The First Amendment to the Constitution provides:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably, to assemble, and to petition the Government for a redress of grievances."

Title 5, Section 5525 USCA provides:

> "The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate. Pub. L. 89-554, Sept. 6, 1969, 80 Stat, 481."

Title 5, Section 5527(c) USCA REGULATIONS, provides:

> "The head of each Executive agency may prescribe and issue regulations, not inconsistent with the regulations of the President issued under subsection (b) of this section, necessary and appropriate to carry out his functions under this subchapter. Pub. L. 89-554, Sept. 6, 1966, 80 Stat, 481."

Title 5, Section 702 USCA, RIGHT OF REVIEW, provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub. L. 89-554, Sept. 6, 1966, 80 Stat, 392."

The pertinent provisions of the Executive Orders and of the Federal Labor Relations Council and Civil Service Commission Regulations are quoted in Appendix E, *infra*.

STATEMENT OF THE CASE

I

Presentation of the Constitutional Issue and of Petitioners' Right to "Check-Off" in the Courts Below [2]

Petitioners' claims under the Constitution of the United States and under Title 5, Section 5525, were duly raised in

[2] The right of privilege granted to an employee to request agency heads to withhold union dues, pursuant to statute or regulation, is generally referred to as "check-off". See Standard Form 1187, Request and Authorization * * * For Voluntary Allotment of Compensation, etc., attached to complaint.

the verified complaint before the U. S. District Court, filed in the Office of the Clerk of that Court on July 19, 1971, (see pars. 1, 14-25, and 36-39 of the complaint). The constitutional and statutory claims of the petitioners' were also presented before the Court of Appeals, both in oral argument and in the petitioners' brief, (see Brief in support of motion for a preliminary injunction etc., filed in the Court of Appeals, pages 1a-8 and 37-42).

II

The Question at Issue

The basic question is whether the Federal Labor Relations Council and the Civil Service Commission, acting under claimed authority of an Executive Order, may terminate the status of "formal recognition" for unions of minority status, including appellants NFFE and Local 2 thereof, and its individual members, as of July 1, 1971, thereby denying the statutory right or privilege of dues withholding for minority unions and their members, while granting such right or privilege only to majority unions with "exclusive recognition" status.

III

Union Petitioners

Petitioner, hereinafter referred to as NFFE, has been in existence since 1917, and is the first general union, (exclusive of postal employees) of Federal employees in the United States, (affidavit of Nathan T. Wolkomir attached to complaint verified July 19, 1971).[3] Dr. Wolkomir, who

[3] "Since the action was dismissed by the Court of Appeals, the allegations of the complaint (and the verified affidavits attached thereto of Nathan T. Wolkomir, Valentine J. Kozak, Lawrence Chivers, and Harrison Gilmer), must be accepted as true". *Norwalk Core*, et al,—petitioners—appellants, against *Norwalk Redevelopment Agency*, et al, defendants—appellees, 395 Fed. 2nd, pg. 920, 924 (U.S.C.A. 2nd Cir. 1968). *Price* v. *Hardin*, 425 F. 2nd. 1137, 1140-41, (U.S.C.A. 5th Cir. 1970).

during his six years as National President has visited with most of the Locals in the United States and its possessions, which make up the NFFE, is fully familiar with the financial benefits and protection which the national union provides to its members through insurance programs, security of employment protected by the merit system, and the advocacy of necessary legislation to assure Federal employees fair treatment without discrimination due to race, color or sex. The full financial support to the national union comes from members' dues. Without such dues and their speedy and efficient collection, through the check-off system employed by the agency, as authorized by the statute, there could be no NFFE. Regulations based on the Act of Congress accorded "formal recognition" status (App. E, Ex. O. 10988) to unions, and made it possible for NFFE and other national unions similarly situated, to carry on their activities on behalf of its members. The arbitrary cutting off of "formal recognition" by the Federal Labor Relations Council, as of July 1, 1971, has already resulted in a severe weakening of the union and its locals throughout the United States and its possessions, and has already caused the loss of hundreds of members and the consequent loss of many benefits previously enjoyed by them.

Furthermore, the disastrous effects which are likely to follow the cancellation of dues withholding, as stated in the affidavits of Messrs. Kozak, Chivers, and Gilmer, attached to the verified complaint, demonstrate the economic and practical impossibilities of prompt and efficient dues collection, without benefit of the eight-year-old statutory dues withholding arrangements for Federal employees, (Title 5, Section 5525, U.S.C. and Executive Order 10982). These affidavits further

> "... demonstrate that the constitutional right (recognized by Executive Order 10988 and 11491, Section 1(a)), to assemble, join an organization, meet and discuss mutual employment problems, elect officers of a

local, and to present employee grievances to agency officials, has been well served by NFFE for upwards of 50 years. It is this right which is now being threatened by at least partial, if not total destruction.

6. The decision of the Federal Labor Relations Council, (see complaint, par. 31), to terminate the dues withholding rights of all employees not within exclusive units, violates the statute and the Constitution of the United States, is discriminatory, and could lead to the destruction of labor organizations such as ours". (paragraphs 5 & 6, affidavit of Dr. Wolkomir).

Dr. Wolkomir's affidavit further states (par. 6) that currently the NFFE per capita collection of dues for union members, through statutory dues withholding, is approximately $2.00 per month. Since the services rendered by NFFE to Federal employees are substantial,[4] the total elimination of dues withholding for the plaintiffs' union members, and the present necessity to incur the expense of personal collection of dues, has caused the impossible situation where it costs more to collect the dues from individual members, than the total amount received from them. Especially is this true in those areas, such as the Navajo Indian Reservation which embraces four states in the far West, where some 1300 union members divided among 30 locals, are scattered over an area of 2500 square miles (affidavit of Valentine J. Kozak, pars. 2 and 10).

The consequence of NFFE's inability to carry on the mentioned activities on behalf of Federal employees with a substantially curtailed budget, due to the discontinuance of dues withholding for its members, means in practical effect that the only unions capable of withstanding the loss of dues income are those who will gamble on an extensive deficit operation, or will secure financial support and sponsorship through affiliating with heavily financed private

[4] Representation activities before the U. S. Congress of NFFE, on behalf of Federal Employees, embraces all aspects of the conditions of employment; pay, retirement, life insurance, health benefits, annual and sick leave, per diem for travel, etc.

sector unions, heretofore foreign to the free Federal employees union concept. This would inevitably lead to a complete monopoly by the well capitalized entrenched private sector unions, who will then dominate and exert their influence over labor organizations representing Federal employees (Dr. Wolkomir's affidavit, pars. 6 and 13).

Dr. Wolkomir estimates that at least 20% of NFFE membership will be obliged to drop their affiliation and lose the attendant benefits derived from union membership, due to termination of the dues withholding arrangement as of July 1, 1971. As a consequence, the loss of dues income to NFFE may well exceed the sum of $250,000.00 annually. This would place an inexorable financial burden on the NFFE treasury, and will lead to a severely weakened organization, if not its ultimate total destruction. Such a destruction of NFFE locals which were organized by, and affiliated with, NFFE for more than 50 years, such as Local 2, one of the plaintiffs, will adversely affect all other independent unions who did not represent a majority of the members at any particular plant or agency as of July 1, 1971, and were therefore, not qualified to be accorded exclusive recognition on that date, when "formal recognition" was abolished and with it dues allotment and withholding for minority union employees. (Dr. Wolkomir's affidavit, par. 14.)

The total number of union members of NFFE who are threatened with loss of their union membership in NFFE, as a consequence of the arbitrary and illegal action of the Federal Labor Relations Council, is likely to be close to 15,000.

IV

Local 2 and Individual Petitioners

Harrison Gilmer, President of NFFE Local 2, states in his affidavit (par. 2) that his local has represented Civil Service employees of the metropolitan Washington, D. C.

area for the past 56 years. Martha Ginsburgh, Willie McCurdy, Roy Glammeyer and Dina Maltagliati, who are GS-4, 5, and 7 employees, respectively, of the Bureau of Land Management, Department of Interior, are members of Local 2 and have duly executed authorizations for payroll deductions in favor of Local 2 upon the standard form authorized by the Government.

They are complaining of the acts of the defendants, not only for themselves, but for such other members of union locals throughout the U. S. who have common interests with petitioners and are similarly situated, by reason of the denial to them of dues withholding by the defendants.

The majority of Local 2 members do not have check accounts and having their dues deducted and sent to the union, through membership in Local 2, has accomplished the beneficial purpose of furnishing them with life insurance protection, representation in grievances and in numerous other ways. The great majority of the employees will find it very difficult to continue receiving the benefits of Local 2 membership, because of the great distances, spread over an area of approximately 200 miles, which separates the membership from the office of the Treasurer.

In short, as a consequence of the discontinuance of dues withholding for Local 2 members, who enjoyed the statutory dues withholding privilege for more than 8 years prior to the issuance of the present regulations of the Federal Labor Relations Council and the Civil Service Commission, Local 2 will find it difficult or impossible to maintain financial solvency.

Moreover, the costs of continued maintenance of the benefits received by Local 2 members keep rising while union dues, especially for low paid employees which far outnumber those in the higher grades, must be and are kept low, approximately $33.80 a year. The equal treatment from Government agencies which Local 2 members have been receiving ever since 1963, under their "formal recognition"

status, has been abolished since July 1, 1971. As a consequence, those benefits which Local 2 has won for its members during the past 50 years are now threatened with destruction. Further, the great majority of these employees may not only lose their membership, but also the group life insurance and other benefits dependent on union membership through dues withholding (Harrison Gilmer's affidavit, pars. 7-9).

REASONS FOR GRANTING THE WRIT

1. Public importance of the question at issue. The Congressional purpose in enacting the statute.

Foremost in this Court's consideration and decision to grant certiorari in the case at bar is, we believe, the public importance of the question at issue. Not only do we witness here the exclusion of thousands of "little people" from a statutory right or privilege allowing "each employee" the benefit of union dues withholding, but we see also in the Council's denial of the privilege to minority union members a callous disregard of the independent small union. It is but another example of an executive agency, under the claimed authority of an Executive Order, singling out for preferment the "big" unions among Federal employees, and flouting the many thousands of the average, generally low-paid employees [5a] who, for over 50 years, have shown a preference for membership in the smaller independent minority union.

Through the device of abolishing "formal recognition",[5]

[5a] See affidavits of Valentine Kozak, pars. 3-5, 7-12, 14-15, and of Lawrence Chivers, par. 5, pp. 2-3, attached to complaint.

[5] See Petitioners' Complaint, pars. 26-34.

The Federal Labor Relations Council, acting under Executive Order 11491, §§ 24(b) and (c), issued Regulations 5 C.F.R., part 2412, § 2412.7 described as "new part 2412", and Civil Service Commission Regulations 5 C.F.R. 550.304, which terminate the status of "formal recognition" for unions, and their members, including petitioners NFFE and Local 2 thereof, and denying dues allotments to agency employees, except where they have "exclusive recognition" status. (See Appendix E. 15a).

previously enjoyed by all unions, statutory benefits theretofore enjoyed by petitioners and thousands of union members similarly situated, were arbitrarily and discriminatorily eliminated. For there can be no question about the wording and meaning of the statute, and the Congressional intent behind Title 5, section 5525. It states in clear and simple language that "each employee" of the agency is permitted to make allotments and assignments out of his pay. True, the section states further that each agency head may "establish procedures" whereby each employee is permitted to make allotments and assignments of amounts "out of his pay for such purposes as the head of the agency considers appropriate." However, nothing in the history of the statute, nor in the uniform construction thereof by agencies of the Government for more than 8 years, supports the Council's 1971 newly invented theory,—that only those employees who belong to a majority union with exclusive recognition were intended by Congress to be the sole beneficiaries of the statutory right or privilege. Nor is it fair, moral, or just for thousands of union members throughout the United States to be deprived of the benefits conferred by the Act, and to depend for their enjoyment of the benefits on the will or whim of the Council. Especially is this true when the statute speaks as clearly as it does regarding the benefits which it allows to *each* employee, and not to those only who chance or choose to be members of a majority union.

Our view of the right or wrong of the Council's discriminatory action finds support in the inquiry made of the General Accounting Office by the Chairman of the Civil Service Commission in 1963 (see Complaint, par 16): whether the Commission, by regulation issued on authority of the then statute (Pub. L. 87-304, 5 U.S.C. 3075), may permit agencies to provide "for payroll deductions of union dues *at the request of the employee*"? The Comptroller General responded that under § § 5 and 6 of the law, now

§ § 5525 and 5527 of Title 5, U.S.C., and § 2(b) of the Executive Order 10982, the Commission "* * * may promulgate regulations *permitting employees to authorize allotments from their compensation* (payroll deductions) *for the purpose of paying their union dues* * * *."[6] (Emphasis supplied). Nothing in the Comptroller General's ruling, nor in the uniform practice of agencies of the United States for more than 8 years prior to the issuance of the Council's 1971 Regulations,[7] contravenes the Congressional intent:—to grant to *each* Federal *employee* the benefits of dues withholding, whether such employee was a member of a minority union having "formal representation" or of a majority union with "exclusive recognition".

Comes now, the Federal Labor Relations Council, in July 1971 and, in effect, engrafts the following exception into the statute, to wit,—the benefit of dues withholding "for each employee" means that such an employee must be a member of a majority union with "exclusive recognition" status.

It would be sad enough if such destruction of a statutory benefit was merely inconvenient to minority unions, but not seriously destructive of scores of locals through the loss of thousands of members. However, the unchallenged facts recited in the complaint and affidavits bear witness to the likely complete destruction of numerous locals of NFFE, and to a serious depletion of membership in other minority membership unions similarly affected, throughout the United States.[7a] In these circumstances, are

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[6] 42 Comp. Gen. Dec. 342, 3, January 7, 1963.

[7] *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* and *United States* v. *Radio Television News Directors Association*, 395 U.S. 367, 380-1 (1969), pars. 3-6, 89 S.Ct. 1794, 1801-2.

Ute Indian Tribe of the Uintah and Ouray Reservation v. *Probst*, 428 F.2nd 491, 497 (1970), pars. 11-12.

[7a] See affidavits of Valentine J. Kozak, pars. 8-16, and of Lawrence Chivers, pars. 5-13, attached to complaint; *Price* v. *Hardin*, supra 5.

we not properly urging this Court to find that plaintiffs do have "standing", and that this Court should grant review on a matter so vital to all Federal employees in the United States and its possessions?

This is also, we believe, an issue of first impression under the statute and the First Amendment, and is vital to the continued well being and morale of the plaintiffs and thousands of other Federal employees who have faith in the equal and impartial application of our laws to all men, small and big alike.[7b]

Without this Court's final say in this matter, we shall witness the eventual wrecking in the United States of independent minority unions, through the conferring of a monopoly whereby the financial benefits of dues withholding are reserved to the "exclusive" majority unions only.[7c]

[7b] *First Amendment Right of Association for Public Employee Union Members*, by J. Michael Eisner, 20 Labor Law Journal, 438 (July, 1969); and cases there cited, at footnotes 1, 2, 7, 12; *United Federation of Postal Clerks* v. *Blount* (U.S.D.C. Opinion by three-judge court), 325 F. Supp. 879, 883, pars. 8, 9 (1971); *Thomas* v. *Collins*, 323 U.S. 537, 538 (1945).

[7c] See Dr. Wolkomir's affidavit, (paragraph 6, p. 7-8 *supra*), and *Board of School Directors of the City of Milwaukee, et. al.*, v. *Wisconsin Employment Relations Commission, et. al.*, 42 Wis. 2nd 637, 168 N.W. 2nd 92, 97, 98, par. 4 (1969) where the court stated: "The sole and complete purpose of *exclusive* checkoff is self-perpetuation and entrenchment. While a majority representative may negotiate for checkoff, he is negotiating for all the employees, and, if checkoff is granted for any, it must be granted for all." (p. 98, par. 4).

See also, *Mugford* v. *City of Baltimore*, 185 Md. 266, 272 (1945) 44 A. 2nd 745, 747-748, pars. 7 and 9, cited and followed with approval in *Miller* v. *Wilmington Housing Authority* (165 F. Supp. 275, 279, 280 (1958)); *Fellows* v. *LaTronica*, 377 P. 2nd 550 (Colo. 1962); *International Brotherhood of Electrical Workers* v. *Farmington*, 405 P. 2nd 235 (N. M. 1965); *Local 283* v. *Robison*, 423 P. 2nd 1003 (Idaho, 1967). See also Jay W. Waks, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 Cornell Law Review, 547 at pp. 566-568 (1970); *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 Cornell Law Review 1004, 1024-1026.

We believe the cases in this Court, and in the Court of Appeals of the District of Columbia, clearly uphold the petitioners claim of injury already suffered, as well as continued economic and pecuniary injury, of a kind and character justifying a holding that the Court does have jurisdiction to furnish the relief requested, after the case is heard on the merits.

2. Plaintiffs have "standing" because of continued economic and pecuniary injury and deprivation of benefits Congress wanted them to have.

In *Association of Data Processing Service Organizations, Inc., et, al, Petitioners,* v. *Camp.* 397 U.S. 150, 90 S.Ct. 827 (1970), petitioners sold data processing services to businesses generally. They sought to challenge a ruling by respondent Comptroller of the Currency that, as an incident to their banking services, national banks, including respondent American National Bank, may make data processing services available to other banks and to bank customers. Following dismissal of the complaint for lack of "standing" of petitioners to bring suit, and affirmance by the Court of Appeals, the Supreme Court granted a petition for writ of certiorari. This Court held that the first question was whether plaintiff alleged that the challenged action had caused him injury in fact, economic or otherwise. There was no doubt that petitioners had satisfied that test (p. 152). The Court stated that "standing" was concerned with "the question whether the interest sought to be protected by complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (p. 153). Further, "* * * the Administrative Procedure Act granted standing to a person 'aggrieved by agency action within the meaning of a relevant statute', 5 U.S.C. 702 (1964 Ed. Supp. IV)" (p. 153-4).

Petitioners in the case at bar, just as in the case cited, are not only " 'likely to be financially injured' ", but have already been financially injured because of depletion of membership directly caused by elimination of dues withholding. Therefore, they "* * * may be a reliable private attorney general to litigate the issues of the public interest in the present case" (p. 154).

The Court found no evidence that Congress in either of the two Acts involved in the *Data Processing* case sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under those statutes. The Acts did not in terms "protect a specified group" (p. 157), anymore than § 5525, in the case at bar, in terms protects or favors with the benefits available a majority over a minority union.

It was clear, said the Court, that the "petitioners, as competitors of national banks which are engaging in data processing services, are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action' " (p. 157). Petitioners in our case are likewise competitors of the majority unions, and are, therefore, that class of "aggrieved" persons who are entitled to judicial review of the Council's action.

And as to whether anything in 5 U.S.C. § 5525 gives petitioners a "legal interest" that protects them against a violation of that Act, and whether the actions of respondents did in fact violate that Act, is a question which goes to the merits and should be decided below.[8]

This Court held in *Barlow* v. *Collins*, 397 U.S. 159, 90 S. Ct. 832(1970), that tenant farmers had standing to

[8] So held the Court respecting the "legal interest" of the petitioners in the "Data Processing" case, and whether the actions of respondents did in fact violate the two Acts mentioned. The Court decided that the petitioners had standing to sue and remanded the case for a hearing on the merits. (397 U.S. 150, 158), 90 S.Ct. 832.

challenge a regulation which *increased* their freedom from governmental restraint—since it released the tenant farmers from restrictions imposed by a prior regulation.[9]

Petitioners, for themselves and other farmers similarly situated, sought declaratory judgment that the amended regulation was invalid and unauthorized by statute, and for an injunction prohibiting the federal officials from permitting assignments pursuant to the amended regulation. The courts below held that they lacked standing, because the Act in question neither expressly nor by implication gave petitioners standing to challenge this administrative regulation; nor did it give the Courts authority to review such administrative action.

This Court reversed, *first,* on the ground that the tenant farmers had "the personal stake and interest that impart the concrete adverseness required by Article III", (p. 164). *Second,* the tenant farmers were within the zone of interest protected by the Act. Implicit in the statutory provisions and their legislative history, was a Congressional intent that the Secretary "protect the interests of tenant farmers", and an "intent to benefit the tenants" (p. 164, pars. 1-4). Hence, they were "persons aggrieved by agency action within the meaning of a relevant statute, as those words are used in 5 U.S.C. 702 (1964 ed. Supp. IV)' " (p. 165). *Third,* judicial review of the Secretary's action was not precluded, even though the amended regulation under challenge authorized the Secretary to " 'prescribe such regulations as he may deem proper to carry out the provisions

[9] The challenged regulation permitted the tenant farmers to do something the prior regulation prohibited. They objected to the new regulation because it allegedly allowed landlords to compel them to obtain financing of all their farm needs from the landlords who charged such high interest rates that their profits each year were consumed in debt payments. See discussion of this case by Professor Kenneth Culp Davis, in: THE LIBERALIZED LAW OF STANDING, 27 U. of Chicago Law Review, 450, at 454.

of this chapter' " (p. 166, pars. 5 and 6). As to whether nonreviewability could fairly be inferred, the Court stated:

> "The question then becomes whether nonreviewability can fairly be inferred. As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. (citing cases). * * * Indeed, *judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.* In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, * * * we held that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' " (citing cases, our emphasis). 397 U.S. 166-7, pars. 7-9.

In our case also, the reason for the recommendation by President Kennedy and the President's Task Force [10] that

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[10] See Memorandum For The Chairman, Civil Service Commission dated May 21, 1963, signed by President John F. Kennedy. Referring to Executive Order 10988 the President wrote: "One feature of this program, the voluntary withholding of employee organization dues, was not authorized by that Order in the belief that such action could only be achieved through legislation. Subsequent study of legislative authority has indicated that Sections 5 and 6 of Public Law 87-304 provide the basis for administrative action to accomplish this desirable purpose. By Executive Order 10982, I delegated authority to the Civil Service Commission to perform the functions conferred upon the President by the provisions of Section 6 of that Act with respect to allotments and assignments authorized by Section 5." (See Exhibit C, attached to statement of Chairman of Council, filed by Respondents in District Court file.)

See also the Report of the President's Task Force on Employee-Management Relations in the Federal Service dated November 30, 1961, at page 21.

". . . Although the Task Force has endeavored to confine its recommendations to matters within the range of executive authority, *the potential importance of the withholding of dues is such as to warrant an exception. This is a matter which must be authorized by law.* The Task Force accordingly recommends that the President propose legislation to the Congress that would provide such authorization." (our emphasis). (See Exh. "B" in USDC file mentioned, supra, first para.)

a law be passed by the Congress authorizing voluntary dues withholding of Federal employees was to confer a benefit upon them. §§ 5525 and 5527 [11] of Title 5 were but a reaffirmation, in 1966, by the Congress of the authority previously conferred by §§ 3075 and 3076 of Title 5, which became law on September 26, 1961. It was pursuant to the earlier two sections that the Comptroller General ruled (p. 11, 12 *supra*) that agencies of the Government could establish procedures for employees to receive dues withholding benefits. The agencies did institute such procedures and Government employees had been receiving dues withholding benefits for over three years when the present sections became law. This practice continued for more than five additional years until July 1, 1971, when the statutory benefits were eliminated by the Council for minority representation unions such as the petitioners. In so doing, the Council violated a principle of statutory construction that "Subsequent legislation (§§ 5525 and 5527) declaring the intent of an earlier statute (§§ 3061 and 3062) is entitled to great weight in statutory construction." [8] The Council violated "the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong [9] (citing cases), especially when Congress has refused to alter the administrative construction" [10] (citing cases), *Red Lion Broadcasting Co.* v. *F.C.C., supra,* 89 S.Ct. 1794, 1801-1802, pars. 3-6, 395 U.S. 380-1 (1969).

In our case also, the Congress had not "just kept its silence by refusing to overturn" (in 1966) prior uniform agency construction of §§ 3061 and 3062 granting dues withholding benefits to minority unions, "but has ratified it with positive legislation", (Red Lion Broadcasting Co. *supra,* p. 1802), §§ 5525 and 5527.

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[11] §§ 5525 and 5527, of Title 5, U.S.C. became law September 6, 1966.

3. Cancellation of plaintiffs' dues withholding agreements, and their debarment from entering into such agreements reveals such an absence of legal authority or basic fairness as to present a justiciable controversy.

Plaintiff NFFE and its locals throughout the United States, following the Comptroller General's decision of 1963, entered into agreements with the various agencies of the Government, which provided dues withholding for union members who had executed voluntary requests therefor. Such agreements were executed by the agencies both with majority and minority unions, which had formal representation status. These agreements were cancelled by the agencies along with the dues withholding provisions they contained, as a result of the Council's action. Since on or about July 1, 1971, thousands of members were thus left without the statutory benefits previously enjoyed by them.

Scanwell Laboratories, Inc. v. *Shaffer, Administrator, et al,* 424 F. 2nd 859 (U.S.C.A., D.C., 1970) is illustrative of the injustice and illegality of the deprivation of the statutory benefits. This was a suit for declaratory judgment to nullify action of the Federal Aviation Administration in letting a contract for instrument landing systems. The District Court dismissed the complaint for lack of jurisdiction. The Court of Appeals, in an exhaustive opinion which reviewed the relevant cases in this Court and in the U.S. Courts of Appeals, held that under the Administrative Procedures Act, the party which was denied a government contract because of alleged illegal activity by FAA in letting the contract to an irresponsible bidder, had standing to bring suit for declaratory judgment to determine the validity of agency action. Quoting from *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140-141 (1967); " 'that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review,' "(cf *Rusk* v. *Cort,* 369 U.S. 367, 82 S. Ct. 787, at 379-380), the Court found no evidence "of a contrary

legislative intent which affects the appellant's position in the current case. If anything, the legislative intent with respect to the field of government contracting in general seems to run in precisely the opposite direction, that is, in favor of review." (424 Fed. 2nd 865-866, see Appendix F, for a detailed discussion of the applicability of Scanwell to our case).

In *Gonzalez* v. *Freeman*, 334 Fed. 2nd 570, 574 (U.S.C.A., D.C., 1964), appellants sought a declaratory judgment and injunctive relief against the Secretary of Agriculture who had debarred them from participating in certain contracts with Commodity Credit Corporation. Appellees urged that doing business with C.C.C. was not a legally protected right and suspension of eligibility for five years gave rise to no justiciable controversy. Speaking for the Court, Circuit Judge Burger (now Mr. Chief Justice Burger) stated that, broadly speaking, it was correct "* * * to say that no citizen has a 'right,' in the sense of a legal right, to do business with the government * * * But use of such terms as 'right' or 'privilege' tends to confuse the issues presented by debarment action. Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences * * * Thus to say that there is no 'right' to government contracts does not resolve the question of justiciability. Of course there is no such *right;* but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts. An allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy in our view. The injury to appellants alleged in their complaint gives them standing to challenge the debarment

processes by which such injury was imposed. * * *" Citing cases (pp. 574-575)[11a]

In the case at bar, plaintiffs enjoyed statutory benefits for many years, along with thousands of other union employees, as members of a minority independent union in the Federal service. Plaintiffs have been, and are now, debarred from further enjoyment of such benefits, and are further debarred from entering into contracts with government agencies for continued dues withholding. Surely, the "grave economic consequences" and the threatened financial losses as well as the loss of the "fundamental right" to belong to the union of their choice,[12] presents a justiciable controversy. See also K. C. Davis, *Administrative Law Treatise* (1970 Supplement) Chapter 22, "Standing", §§22.00, 22.00-1 and 22.00-5; Raoul Berger, *Administrative Arbitrariness: A Synthesis,* 78 Yale L.J. (1969), at p. 965, 968, 997; and K.C. Davis, *The Liberalized Law of Standing,* 37 U. of Chicago L. Review (1970), at p. 450, 457, 461 (where *Gonzalez* v. *Freeman, supra,* along with the other recent Supreme Court and U.S. Court of Appeals (D.C.) cases, are commented upon); and pp. 468-473.

4. Plaintiffs' fundamental right to belong to an independent union of their own choice has been violated by the Council's action.

In *United Federation of Postal Clerks,* Plaintiff, against *Blount,* as *Postmaster General,* Defendant, 425 F. Supp 879 (1971), the court pointed out (at page 882) that Congress had consistently treated public employees as being in a different category than private employees. Thus Section 305 of the Taft Hartley Act made it unlawful for,

[11a] See also *Norwalk Core et al.,* v. *Norwalk Redevelopment Agency* (U.S.C.A. 2nd Circuit, 1968), *supra,* p. 5, 395 Fed. 2nd, at 933, par. 11.

[12] *United Federation of Postal Clerks* v. *Blount,* 325 F. Supp. 879, 883, pars. 8, 9, and p. 13, footnote 7b, *supra.*

Federal employees to participate in a strike, providing immediate discharge and forfeiture of Civil Service status for infractions. However, "the fact that public employees may not strike does not interfere with their rights which are fundamental and constitutionally protected. The right to organize collectively and select representatives for the purpose of engaging in collective bargaining is such a fundamental right." *Thomas* v. *Collins*, 323 U.S. 516, 65 S.Ct. 315, * * * (p. 883).

The court further stated that the right of public employees to organize and select representatives for lawful purposes of collective bargaining, which the Supreme Court had characterized as a *fundamental right*," 'was recognized as such in its decisions long before it was given protection by the National Labor Relations Act' ", 336 U.S. at 259, 69 S.Ct. at 524 (p. 883).

We point out, therefore, the error of the District Court in grounding its decision of lack of jurisdiction and dismissal of the complaint, in part, upon the theory that "the right of unionization in Government service is not a constitutionally protected right" * * * (App. B, 6a).

We conclude from *Blount* and from the decisions of this Court, that under the First Amendment, plaintiffs as individual union members, and others similarly situated, by virtue of being denied dues check off as well as formal representation, are being actively discouraged and hindered from belonging to NFFE and its locals, such as Local 2. Plaintiffs are further being forced to join a union not of their choice, but rather one which has exclusive recognition. In addition, the granting by the Federal Labor Relations Council of a statutory privilege of dues withholding only to exclusive recognition majority unions, is discriminatory and violative not only of the statute but of the Fifth Amendment to the U.S. Constitution. Such discrimination grants an illegal preference to the exclusively recognized

majority at the expense of the minority union. See *Thomas* v. *Collins*, 323 U.S. at 537, 538:—

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. cf. *Labor Board* v. *Virginia Electric & Power Co., supra.* But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585, 587-588 (1952), and *Massachusetts* v. *Laird*, 400 U.S. 886, Mr. Justice Douglas' dissenting opinion, at 887, 891, 893, par. 4, 898, (1970).

The rights and privileges granted plaintiffs by the Constitution of the United States, Amendments 1 and 5, and the benefits granted plaintiffs and many thousands of other union members similarly situated, by the statute, may not be taken away from them by the Council under the claimed authority of an Executive Order.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING K. GELLER
HERMAN WOLKINSON
Attorneys for Petitioners

December, 1971

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

Civil Action No. 1442-71

No. 71-1593

NATHAN T. WOLKOMIR, as President, National Federation of Federal Employees, et al., *Appellants* v. FEDERAL LABOR RELATIONS COUNCIL, by Robert E. Hampton, Chairman et al., Office of Management and Budget.

Before: FAHY, Senior Circuit Judge and ROBB and WILKEY, Circuit Judges.

ORDER

This cause came on for consideration of appellants' motion for temporary restraining order and preliminary injunction, and the Court heard argument of Counsel.

On consideration of the foregoing, it is

ORDERED by the Court that appellants' motion for temporary restraining order and for preliminary injunction is denied, and it is

FURTHER ORDERED by the Court that appellees' oral motion for summary affirmance of the District Court's decision is granted.

Per Curiam

United States Court of Appeals for the District of Columbia Circuit. Filed, August 10, 1971 NATHAN J. PAULSON, *Clerk.*

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1428-71

USCA 71-1581

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *Plaintiff* v. ROBERT E. HAMPTON, Chairman, Federal Labor Relations Council, et al., *Defendants.*

USCA 71-1593

NATHAN T. WOLKOMIR, as President, National Federation of Federal Employees, et al., *Plaintiffs* v. FEDERAL LABOR RELATIONS COUNCIL, et al., *Defendants.*

Washington, D. C., July 22, 1971

The above-entitled causes came on for hearing on Defendants' Motion to Dismiss before the HONORABLE GERHARD A. GESELL, United States District Judge, at 2:00 p.m.

APPEARANCES:

EDWARD L. MERRIGAN, Esq.,
Of: SMATHERS & MERRIGAN,
Counsel for Plaintiff American Federation of Government Employees

ALEXANDER BOSKOFF, Esq.,
IRVING I. GELLER, Esq.,
HERMAN WOLKINSON, Esq.,
Counsel for Plaintiffs National Federation of Federal Employees, et al.

GILBERT ZIMMERMAN,
JOSEPH M. HANNON,
Assistant United States Attorneys, Counsel for Defendants

PROCEEDINGS

THE COURT: The Court has before it this afternoon two separate proceedings, one brought by the American Federation of Government Employees, and the other by a group whose case is captained by Nathan T. Wolkomir, et al., each against the Federal Labor Relations Council and certain named individuals, challenging action taken by the Federal Labor Relations Council pursuant to an Executive Order of President Nixon, dated October 29, 1969.

Applications were made for temporary restraining orders. These were denied and the matters were set down back-to-back for argument today on the Government's indicated Motion to Dismiss, in order that the basic jurisdictional questions presented by these cases could be resolved at the very earliest possible date and prior to any time when the effect of the challenged action by the Council would lead to a termination of certain dues check-offs previously being made by various unions of Government workers.

On the basic question of the Court's jurisdiction raised by the Defendants' Motion to Dismiss, the Court is of the view that the Court lacks subject matter jurisdiction and that the motion should be granted in both cases.

The two controlling cases before the Court, which the parties are generally agreed are of particular importance are Manhattan Bronx Postal Union v. Gronouski, in 121 App. D.C. 324; and National Association of Government Employees v. White, in 135 App. D. C. 290. These cases really do not present two alternative points of view but must be read together as stating the applicable law that has been developed in this jurisdiction by our Court of Appeals on the matter of the Court's jurisdiction particularly in questions affecting Federal employment.

Since the outset in Gronouski our Court of Appeals has made clear that there has not been an intention on the part

of Congress or the President to create a role for the Judiciary in the implementation of personnel policies, and that jurisdiction of this Court must either rest upon a situation such as was present in National Association of Government Employees v. White, which involved a clash with basic constitutional safeguards, or in a situation which demonstrates that the Executive has proceeded in a substantially arbitrary and capricious manner, far beyond a mere question of due process, to a point where basic inherent rights are being adversely and seriously affected.

I do not think these cases fall in either of these categories. The only action of Congress that bears on this question is that found in a permissive statute enabling procedures to be developed for the check-off of dues. It seems to the Court entirely reasonable and proper for the Executive, given his responsibility over all such agencies, to undertake, through the creation of the Federal Labor Relations Council, a body that would seek to make dues check-off procedures in the Federal service uniform and which would seek in so far as possible to regularize the conduct of Federal affairs with regard to employees.

If that be correct, as I believe it is, then the issue comes down to whether or not the Federal Labor Relations Council has proceeded in an arbitrary manner; and particularly the question would be whether it has proceeded contrary to the explicit directions of the President in the Executive Order, the field where he has, of course, preeminent authority.

As the Court reads the Executive Order, the Executive Order, in Section 8(b)(3), contemplated that formal recognition could be terminated by the Federal Labor Relations Council at any time under regulations. These regulations have issued but only after adequate notice to the affected unions, after hearing the positions of the unions, after granting extensions, and proceeding in the deliberate and appropriate manner that such a council should follow.

Accordingly, the Court feels that this is one of those situations where there is no reason in law why a court can intervene with the discretion of the Executive in his handling of a matter so peculiar to the Executive, namely, the labor activities of employees of the Executive departments.

The arguments submitted to the Court have been extremely persuasive in terms of the questions as they may affect particular unions here. The Court is not in any way passing on whether the Court, if it had been a member of the Federal Labor Relations Council, would have approved the regulations.

Perhaps this deserves an additional word. We have a Government which has several branches and the limits of the Judiciary are clear. In recent years it has appeared to this Court that as the complexity of the Executive Branch has grown, as the complexity of the problems that the Congress has to deal with has increased, that there has been a tendency to bring all matters involving citizens into a Federal Court on the theory that the Federal Court and the Federal Court alone is the only place to present justifiable grievances or particular situations where the shoe pinches.

Arguments to the Court that something is against the intersets of humanity, that in some way it is morally wrong, that it shouldn't happen in good union relations, and questions of that sort are not for the courts. Congress could clearly make dues check-offs mandatory by a stroke of the pen if it wanted to do so. It hasn't done so. The statute is purely permissive. Congress has not affirmatively directed dues check-offs.

The President, in his wisdom, has an extremely complex problem to deal with and is seeking uniformity within the Federal service, but it is not the function of the Court to interfere unless there appears to be—after what might be called a peek at the entire situation, I believe is what Judge

Leventhal once said in a case—evidence of substantial interference with basic rights by arbitrary and capricious action or action that precludes clear constitutional guarantees.

I do not think this action here does either of those things. It appears to the Court that the remedies that the Plaintiffs are seeking are not in the courts but they must be addressed to the Executive and to the Legislature.

The right of unionization in Government service is not a constitutionally-protected right, as the Court sees it. It is a right that is granted by grace and it is within the province of the Legislature and the President to determine the limits of that right and how it should be exercised.

I have moved these matters up promptly for decision, gentlemen, to provide ample opportunity for any review of the Court's determination here.

I think it would be well if a very simple order could be presented, Mr. Zimmerman, which would terminate these proceedings in this Court by dismissal.

I do want to say that counsel on all sides have certainly been of great assistance. I think the papers are excellent. I think the arguments were excellent. It is an instance where counsel have all moved along together to get something decided and I want to express my thanks both to the United States and to the Plaintiffs.

MR. MERRIGAN: Thank you very much, Your Honor.

MR. WOLKINSON: Thank you, Your Honor.

MR. ZIMMERMAN: We will prepare such an order immediately.

THE COURT: Very well.

(Whereupon at 3:45 p.m., the hearing on the motions was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled causes on July 22, 1971, and that the foregoing Pages 1 to 7, inclusive, constitute the official transcript of the Court's Ruling.

/s/ IDA Z. WATSON

APPENDIX C

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1428-71

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *Plaintiffs* v. ROBERT E. HAMPTON, et al., *Defendants*

Civil Action No. 1442-71

NATHAN T. WOLKOMIR, et al., *Plaintiffs* v. FEDERAL LABOR LABOR RELATIONS COUNCIL, et al., *Defendants*

JUDGMENT

These causes having come before the Court (by agreement between counsel and with Court approval given in chambers conferences) for expedited consolidated hearing on (a) defendants' joint motion to dismiss for lack of jurisdiction, and (b) the respective plaintiffs' motions for preliminary injunction (with their preliminary injunction papers treated as their oppositions to defendants' motion to dismiss);

And the Court having heard argument of counsel, having reviewed the record and the memoranda of the parties, and the Court being fully informed in the premises,

It is by the Court this 23rd day of July, 1971,

ORDERED and ADJUDGED:

1. That defendants' joint motion to dismiss be, and it hereby is, granted;

2. That these actions be, and they hereby are, dismissed for lack of subject-matter jurisdiction; and

3. That plaintiffs' motions for preliminary injunction be, and they hereby are, denied as moot.

/s/ GERHARD A. GESELL
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing proposed Judgment has been made upon plaintiffs by mailing a copy to their respective attorneys, Edward L. Merrigan, Esq., 1700 Pennsylvania Avenue, N.W., Washington, D. C. 20006; and Herman Wolkinson, Esq., 1737 H Street, N.W., Washington, D. C. 20006, this 23rd day of July, 1971.

/s/ GIL ZIMMERMAN

Gil Zimmerman
Assistant United States Attorney

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970.

Civil 1428-71

No. 71-1581

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *Appellant* v. ROBERT E. HAMPTON, Chairman, Federal Labor Relations Council, et al.,

Before: FAHY, Senior Circuit Judge; ROBB and WILKEY, Circuit Judges.

ORDER

This cause came on for consideration of appellant's motion for injunctive relief; for advancement of briefing schedule and early argument of appeal, and of appellees' motion for summary affirmance, and the Court heard argument of counsel.

On consideration of the foregoing, it is

ORDERED by the Court that appellant's motion for injunctive relief; for advancement of briefing schedule and early argument of appeal is denied, and it is

FURTHER ORDERED by the Court that appellees' motion for summary affirmance is granted.

Per Curiam

United States Court of Appeals for the District of Columbia Circuit. Filed, August 10, 1971 NATHAN J. PAULSON, *Clerk.*

APPENDIX E

U. S. CONSTITUTION, AMENDMENT V—CAPITAL CRIMES DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Executive Order 10982, dated December 25, 1961, reissued January 3, 1962, F. R. 3, see text following 5 USCA 5527, provided in Section 2, paragraph (b) as follows:

> "The Civil Service Commission is hereby designated and empowered, without the approval, ratification, or other action of the President, to perform the functions conferred upon the President by the provisions of section 6 of the act with respect to allotments and assignments authorized by section 5 of the act (now section 5525 of this title)."

Federal Personnel Manual issued by the Civil Service Commission in Subchapter S3, Inst. 38, November 18, 1970, ALLOTMENTS AND ASSIGNMENTS OF PAY, states the following:

S3-1 Legal Basis

"a. Law. *The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of*

amounts out of his pay for such purpose as the head of the agency considers appropriate." (Section 5525 of title 5, United States Code). (Italicized in FPM Supp. 990-2).

"b. Executive Order 10982. The Commission, under authority of section 2 of Executive Order 10982, has been delegated authority conferred on the President by section 5527 of title 5, United States Code, to promulgate regulations necessary and appropriate to carry out the purposes of section 5525 of title 5, United States Code."

Executive Order 10988, dated January 17, 1962 (see text following 5 USCA § 7301), provided in § 3 (a) and (b) that:

"(a) Agencies shall accord informal, formal or exclusive recognition to employee organizations which request such recognition in conformity with the requirements specified in sections 4, 5, and 6 of this order, except that no recognition shall be accorded to any employee organization which the head of the agency considers to be so subject to corrupt influences or influences opposed to basic democratic principles that recognition would be inconsistent with the objectives of this order.

(b) Recognition of an employee organization shall continue so long as such organization satisfies the criteria of this order applicable to such recognition . . . ."

Executive Order 11491, dated October 29, 1969, provided:

"WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, *I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.* (our emphasis)

GENERAL PROVISIONS

Section 1. *Policy.* (a) *Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.* Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. *The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.* (our emphasis)

ADMINISTRATION

Sec. 4. *Federal Labor Relations Council* (a) There is hereby established the Federal Labor Relations Council, which consists of the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, *the Director of the Office of Management and Budget*, and such other officials of the executive branch as the President may designate from time to time. The Civil Service Commission shall provide *administrative support* and services and staff assistance to the Council to the extent authorized by law.

(b) The Council shall administer and interpret this Order, decide major policy issues, prescribe regulations, and from time to time, report and make recommendations to the President.

MISCELLANEOUS PROVISIONS

Sec. 21. *Allotment of dues.* (a) When a labor organization holds formal or exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when—

(1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or

(2) the employee has been suspended or expelled from the labor organization.

(b) An agency may deduct the regular and periodic dues of an association of management officials or supervisors from the pay of members of the association who make a voluntary allotment for that purpose, and shall

recover the costs of making the deductions, when the agency and the association agree in writing to this course of action. Such an allotment is subject to the regulations of the Civil Service Commission.

Sec. 24. *Savings clauses.*

(b) All grants of informal recognition under Executive Order No. 10988 terminate on July 1, 1970.

(c) All grants of formal recognition under Executive Order No. 10988 terminate under regulations which the Federal Labor Relations Council shall issue before October 1, 1970."

FEDERAL LABOR RELATIONS COUNCIL—Memorandum dated February 10, 1971, effective February 12, 1971, § 2412.7 *"Termination of formal recognition at the national level.*

(a) In accordance with the provisions of section 8(b)(3) of Executive Order 11491, a grant of formal recognition to a labor organization at the national level shall terminate:

(1) In an agency:

(i) When that labor organization which holds national formal recognition is granted national consultation rights by the agency; *or*

(ii) On July 1, 1971, whichever is sooner."

CODE OF FEDERAL REGULATIONS, dated January 1, 1971, § 550.304 Circumstances under which allotments are permitted.

"(a) An agency may permit an employee to make an allotment on a current basis when he is:

(5) A member of a labor organization which holds exclusive recognition under Executive Order 11491 for employees in the exclusive unit in which the member is employed, and with which an agency has agreed in writing to deduct allotments for the payment of dues to the labor organization and to recover the costs of making the deductions; . . ."

APPENDIX F

Just as the plaintiff in *Scanwell* rightly complained of being deprived of the privilege of entering into a contract with the Government agency, so here, the individual union members, NFFE and Local 2 are rightly complaining of the nullification of their existing contracts with government agencies as of July 1, 1971, theretofore entered into by virtue of § 5525 and Executive Order 10982.

> The Court in *Scanwell* also held that there "is a powerful argument for allowing the plaintiff in the current case the requisite standing to challenge the governmental action of which it complains. Regardless of the merits of plaintiff's case, it should be granted the right, if possible, to make a prima facie showing that the government's agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of the contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits, at least until or unless this country adopts the ombudsman system used so successfully as a watchdog of governmental activity elsewhere." 424 F. 2nd. 866-7.

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No. 71-750

In the Supreme Court of the United States

OCTOBER TERM, 1971

NATHAN T. WOLKOMIR, AS PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ET AL., PETITIONER

v.

FEDERAL LABOR RELATIONS COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion and judgment of the district court (Pet. App. 2a–7a, 8a–9a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1971 (Pet. App. 1a). On November 4, 1971, Mr. Chief Justice Burger extended the time within which to file a petition for a writ of

certiorari to December 8, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly declined to interfere with the decision of the President to terminate recognition by the Executive Branch of federal-employee minority unions, and to discontinue the withholding of union dues from the compensation of employees who were members of such unions.

STATUTES, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

Title 5, section 7301, United States Code, reads as follows:

> The President may prescribe regulations for the conduct of employees in the executive branch.

Title 5, subchapter III, section 5525, United States Code, provides as follows:

> The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate.

Title 5, subchapter III, section 5527, United States Code, provides in pertinent part as follows:

> (a) To the extent practicable in the public interest, the President shall coordinate the policies and procedures of the respective Executive agencies under this subchapter.
>
> (b) The President, with respect to the Executive agencies * * * shall prescribe and issue, or

provide for the formulation and issuance of, regulations necessary and appropriate to carry out the provisions, accomplished the purposes, and govern the administration of this subchapter.

Executive Order 11491 (1969), 34 Fed. Reg. 17605, provides in pertinent part as follows:

* * * * * * *

Sec. 21. *Allotment of dues.* (a) When a labor organization holds formal [minority] or exclusive [majority] recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions. * * *

* * * * * * *

Sec. 24. Savings clauses. * * *

* * * * * * *

(c) All grants of formal [minority] recognition under Executive Order 10988 terminate under regulations which the Federal Labor Relations Council shall issue before October 1, 1970.

* * * * * * *

Regulations of the Federal Labor Relations Council, 5 C.F.R. 2412.7 and 2412.8, as amended, provide that grants of formal [minority] recognition shall terminate not later than July 1, 1971.

STATEMENT

Petitioner, as president of the National Federation of Federal Employees (NFFE), a government-em-

ployee labor union, commenced this action in the United States District Court for the District of Columbia on behalf of NFFE and its local unions, seeking to enjoin the enforcement of regulations issued by respondent Federal Labor Relations Council terminating, as of July 1, 1971, the withholding of dues of members of minority federal-employee unions. He argued that such a termination was contrary to the relevant federal statute (5 U.S.C. 5525) and, because it did not apply to members of majority unions, constituted an invidious discrimination in violation of the First and Fifth Amendments. The district court concluded that it lacked subject matter jurisdiction and dismissed the complaint (Pet. App. B, pp. 2a–6a).[1] The court of appeals affirmed *per curiam* (Pet. App. A, p. 1a).

Agency recognition of both majority and minority government-employee unions was first authorized by Executive Order 10988 in January 1962 (Pet. App. E, p. 12a).[2] The Executive Order, however, said nothing with respect to dues withholding for members of such

[1] The complaint in *American Federation of Government Employees* v. *Hampton*, D.D.C., Civ. No. 1428–71, was also dismissed. There, the plaintiff argued that the July 1, 1971, cut-off date should be extended in those cases where an election proceeding was still in progress. The district court concluded that it was without subject matter jurisdiction to review that question (Pet. App. C, pp. 8a–9a) and the court of appeals affirmed *per curiam* (Pet. App. D, p. 10a). The determination in that case is not challenged in this petition.

[2] This Executive Order (27 Fed. Reg. 551) was issued pursuant to the President's authority in 5 U.S.C. 7301 to "prescribe regulations for the conduct of employees in the executive branch." The term "exclusive recognition" was used therein to

unions. Upon an inquiry by the Civil Service Commission (Pet. 11), the Comptroller General ruled in January 1963, that under the applicable statute (5 U.S.C. 3075), the Commission could promulgate regulations "permitting employees to authorize allotments from their compensation (payroll deductions) for the purpose of paying their union dues * * *" (42 Comp. Gen. Dec. 342, January 7, 1963).[3] The Commission then issued regulations authorizing federal agencies to enter into dues withholding agreements with employee organizations having either minority or majority recognition under Executive Order 10988, thereby permitting union employees to make voluntary allotments out of their compensation for the payment of union dues (5 CFR (1964 ed.) 550.304 and 550.305; 28 Fed. Reg. 10993).

---

define the recognition to be given a labor organization selected as the representative by a majority of employees in an appropriate unit; the term "formal recognition" was used to define the recognition to be given a labor organization selected to represent not less than 10 percent of the employees in an appropriate unit (where the unit was not already represented by a majority union). See E. O. 10988, sections 5(a) and 6(a). These same terms were later used in Executive Order 11491, which is under attack in the instant case. See E. O. 11491, section 10(a). The terms "majority" and "minority" are used herein instead of the terms "exclusive" and "formal."

[3] The Comptroller General stated (42 Comp.Gen.Dec. 343): "The language of section 5 of the act of September 26, 1961 [5 U.S.C. (1964 ed.) 3075; now 5 U.S.C. 5525] * * * would permit allotments and assignments of compensation for such purposes as the department head deems appropriate—subject to the regulatory authority of the President which in turn has been delegated to the Civil Service Commission by section 2(b) of Executive Order No. 10982."

In 1969, a special interagency review committee appointed by the President to study federal labor-management relations, recommended that federal recognition of minority unions be terminated. It pointed out that while "this type of recognition was a reflection of what was common practice in labor relations in the Government" at the time of issuance of Executive Order 10988 in 1962, the "prevailing form of recognition [in 1969] is exclusive [majority]." *Report and Recommendations on Labor-Management Relations in the Federal Service*, pp. 33–34 (August 1969) ("Report"). Due primarily to the rapid growth of union representation over the intervening 7-year period, the committee noted, recognition of minority unions "in recent years * * * has produced problems which hinder the development of stable and orderly labor relations. It has contributed to excessive fragmentation of units, confusing and overlapping relationships, and difficulties in maintaining an appropriate difference in the rights and obligations under [minority] recognition compared with those prescribed for [majority recognition]" (*ibid.*). In conclusion, the committee stated (*Report*, p. 34): "Clearly, employees and labor organizations no longer need the special assistance in organizing provided by formal [minority] recognition, and its continuance is not warranted in view of the problems involved in administering multiple forms of recognition. Accordingly, we recommend that the granting of formal [minority] recognition be discontinued at this time."

On the basis of the August 1969 Report and Recommendations, the President, pursuant to his authority under 5 U.S.C. 7301 (see n. 2 *supra*), issued Execu-

tive Order 11491 (34 Fed. Reg. 17605) on October 29, 1969, to become effective as of January 1, 1970. This order revoked Executive Order 10988 and prescribed new policies governing labor-management relations for federal employees. Insofar as is here relevant, the new Executive Order provided that "[f]ormal [minority] recognition, including formal [minority] recognition at the national level, shall not be accorded after the date of this Order" (E.O. 11491, section 8(a)). Moreover, "all grants of formal [minority] recognition under Executive Order 10988" were to be "terminate[d] under regulations which the Federal Labor Relations Council will issue before October 1, 1970" (E.O. 11491, section 24(c)). With respect to the withholding of union dues from federal employees' compensation, Executive Order No. 11491 authorized such payroll deductions if "the agency and the association agree in writing to this course of action" (section 21 (b)); however, it provided that "[s]uch an allotment is subject to the regulations of the Civil Service Commission * * *" (section 21(a)).

Proposed regulations were announced by the Council and the Commission in September 1970; following public hearings, the regulations were issued in final form in February 1971. Essentially, they set July 1, 1971, as the date for termination of minority recognition (5 CFR 2412.7 and 2412.8, 36 F.R. 2909, 2910). In addition, they specified that the withholding of dues of members of minority unions would continue only "so long as the organization continues to hold formal [minority] recognition" (5 C.F.R. 550.310, 35 Fed. Reg. 16310; and see 5 C.F.R. 550.304 and 550.305, 35 Fed. Reg. 16309).

ARGUMENT

1. Petitioner argues here, as he did below, that the termination of minority recognition, and the attendant loss of dues withholding privileges to members of minority unions, is contrary to 5 U.S.C. 5525. That statute, however, provides only that: "The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate." As the district court pointed out (Pet. App. 5a), the language "is purely permissive. Congress has not affirmatively directed dues check-offs."[4]

Accordingly, Executive Order 11491, and the regulations promulgated thereunder, do not deprive members of minority unions of any statutory rights. The withholding of union dues is a privilege. It became available to federal employees in minority unions by virtue of Executive Order 10988 and the Comptroller General's ruling thereunder. When circumstances some years later warranted a revocation of that Order, the consequent termination of that privilege by the President was entirely appropriate under the statute. And see 5 U.S.C. 5527.

The President followed appropriate procedures in taking such action. Before issuing Executive Order 11491, he appointed a special interagency review commission to make a thorough study of federal labor-management relations; its recommendation was the

[4] The withholding of union dues from an employees' compensation is generally referred to as a "check-off" (Pet. 4 n. 2).

basis for the decision to terminate minority recognition and the attendant dues withholding for members of minority unions (*supra*, p. 6). That decision was, as the district court noted, "entirely reasonable and proper" (Pet. App. 4a). There is thus no reason for judicial intervention "with the discretion of the Executive in his handling of a matter so peculiar to the Executive, namely, the labor activities of employees of the Executive departments" (Pet. App. 5a). See *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451, 457 (C. A. D.C.), certiorari denied, 382 U.S. 978.

2. Petitioner seeks to avoid this conclusion by alternatively casting his argument in constitutional terms. He claims that a termination of recognition to minority, but not majority, unions constitutes an invidious discrimination under the Fifth Amendment, and impermissibly interferes with the right of government employees to join a union of their choice under the First Amendment.

But the distinction between minority and majority unions has been recognized in private industry for several decades as a guiding principle of labor-management relations. Under sections 8(a) and 9(a) of the National Labor Relations Act (29 U.S.C. 158(a) and 159(a)), for example, an employer is obliged to recognize and bargain with only a duly-elected majority union, and is not permitted to bargain contemporaneously with minority unions. There is, of course, no constitutionally-protected right to recognition of minority unionization. As the district court properly observed, that "is a right that is granted by grace

and it is within the province of the Legislature and the President to determine the limits of that right and how it should be exercised" (Pet. App. 6a). Here, the determination was made after an exhaustive study of federal labor-management relations; there was a rational basis for termination. Petitioner has no valid complaint of a deprivation of Fifth Amendment rights. Cf. *Flemming* v. *Nestor*, 363 U.S. 603, 611.[5]

Nor is there any more substance to his First Amendment claim. Essentially, petitioner argues that because minority unions are no longer entitled to federal recognition, and members cannot have their dues withheld, federal employees will be "forced to join a union not of their choice, but rather one which has exclusive [majority] recognition" (Pet. 22). But, there is nothing in Executive Order 11491, or the regulations promulgated thereunder, to support such a conclusion. Federal employees are as free now as they were prior to the termination of federal recognition to join minority unions. Indeed, they are in substantially the same position in this regard that they were in ten years ago, before federal-employee unions had received any agency recognition.

The fact that withholding privileges are not now available to members of minority unions does not

[5] To the extent that petitioner is contending that termination of dues withholding deprived him of property without due process of law, the claim is without merit. At most, members of minority unions have lost nothing more than a government service on their behalf (one which the unions themselves paid for). The termination of such a service is not a constitutional deprivation of property. The union is still free to collect its own dues.

make a difference. Union dues still must be paid and minority unions remain free to collect their own dues. Accordingly, petitioner's contention that, because of termination of the recognition once afforded to such unions, federal employees are being "actively discouraged and hindered" from joining them (Pet. 22) is not well taken.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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